

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF THE PROTEST OF
KERRY AND KATHY SHAHAN
I.D. NO. 01-907197-00 3, PROTEST
TO DENIAL OF CLAIM FOR REFUND

NO. 97-34

DECISION AND ORDER

This matter comes on for determination before Gerald B. Richardson, Hearing Officer. Kerry and Kathy Shahan, hereinafter, "the Shahans", represented themselves in this matter. The Taxation and Revenue Department, hereinafter, "Department", was represented by Gail MacQuesten, Special Assistant Attorney General. The parties agreed to submit the matter upon a stipulation of the parties and briefs or written argument. The last submittal was filed on August 19, 1997 and the matter was considered submitted for determination at that time. Based upon the stipulated facts and the arguments of the parties, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Shahans are residents of New Mexico.
2. On May 8, 1996, the Shahans purchased a mobile home in El Paso, Texas, from Ideal Mobile Homes.
3. The Shahans intended to use this mobile home as their residence in New Mexico.
4. The Shahans paid \$2,726.50 in tax on the transaction.

5. The Shahans' contract with Ideal Mobile Homes identified this tax as a "sales tax."
6. The \$2,726.50 was paid over to the State of New Mexico and was reported under the "Mobile Home Comp. Tax" number used by out-of-state dealers to report and pay compensating tax on behalf of their New Mexico buyers: I.D. No. 01-907197-003.
7. Ideal Mobile Homes did not report or pay New Mexico gross receipts tax on its receipts from the sale of the mobile home to the Shahans, and did not charge the Shahans a passed-through gross receipts tax.
8. The Shahans now use the mobile home as their primary residence.
9. On June 27, 1996, the Shahans filed a timely request for refund of the \$2,726.50 compensating tax.
10. On September 17, 1996, the Department denied the refund request on the grounds that the "receipts from May 1996 are not deductible under Section 7-9-7:1."
11. On November 13, 1996, the Shahans filed a timely protest of the refund denial.

DISCUSSION

The Shahans' protest the imposition of compensating tax on their purchase of a mobile home from an El Paso, Texas mobile home dealer. The mobile home dealer collected the tax and remitted it to the Department pursuant to § 7-9-10 NMSA 1978, which requires persons who carry on activity in this state to exploit New Mexico's markets, such as advertising to New Mexico residents, and who sell property or services for use in New Mexico, to collect and remit on behalf of their purchasers compensating tax on the value of their sales for use in New Mexico. Thus, even

though the tax was remitted to the Department by the mobile home dealer, the tax was imposed upon the Shahans.

The compensating tax compliments the gross receipts tax. Gross receipts tax is imposed upon the sale of property and services in New Mexico. The compensating tax is imposed in instances where gross receipts tax was not imposed for various reasons. One instance is where property is bought from an out-of-state vendor. If New Mexico did not impose a compensating tax, buyers would otherwise be encouraged to purchase things out-of-state in order to save the cost of the passed on gross receipts tax. There could be a significant cost differential for such high ticket items as mobile homes. There is also a credit against compensating tax for the amount of gross receipts, sales or compensating taxes levied on the out-of-state transaction by other taxing authorities. Thus, the compensating tax is intended to create a level playing field between in-state and out-of-state businesses, and purchasers may make their buying decisions without regard to the tax consequences of the transaction.

Compensating tax is imposed pursuant to § 7-9-7 NMSA 1978. The portion of the statute pertinent to the facts of this case is as follows:

A. For the privilege of using tangible property in New Mexico, there is imposed on the person using the property an excise tax equal to five percent of the value of the tangible property that was:

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state;

Had the Shahans bought their mobile home in New Mexico, the mobile home dealer would have been subject to gross receipts tax on its receipts from the sale. Because they acquired their mobile

home out of state, they are subject to the compensating tax for the privilege of using property in New Mexico.

The Shahans have raised a number of legal challenges to the imposition of compensating tax under the facts of this case. First, they argue that they were exercising their right to establish a home and that this is not one of the taxable activities listed in Regulation GR 10:1.¹ This regulation is promulgated to interpret and implement § 7-9-10, the statute which imposed the obligation to collect and remit compensating tax on behalf of the Shahans on the mobile home dealer. It is irrelevant that the Shahans were exercising their right to establish a home for purposes of establishing whether Ideal Mobile Homes was required to collect and remit compensating tax because § 7-9-10 looks at the activities of the person exploiting New Mexico markets, the vendor, in determining whether their activities subject them to the obligation to collect and remit compensating tax on behalf of their purchasers

The Shahans next argue that the imposition of compensating tax is unconstitutional because in purchasing their mobile home, they were exercising their right to establish a home, and they argue that the state may not impose a tax upon the exercise of this right which they argue is protected by Article II, Section 4 of the New Mexico Constitution. This article provides as follows:

All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

While this provision is probably broad enough to encompass a right to establish a home in New Mexico, the fact that such right may be guaranteed by the Constitution does not mean that the

¹ This regulation is now renumbered as 3 NMAC 2.10.8

legislature may not impose a tax which indirectly burdens the exercise of such a right. Arguably, any tax imposed by the state might burden a citizen's efforts to seek and obtain happiness, to paraphrase this constitutional provision. Nonetheless, the Shahans have not directed me to, nor have I found a single case striking down any New Mexico case based upon a violation of Article II, §4 of the New Mexico Constitution. In fact, it has been recognized that the state's power to tax is inherent, and the state may tax under its inherent power unless the constitution prohibits such taxation. *Asplund v. Alarid*, 29 N.M. 129, 137 (1923). As noted above, Article II, § 4 contains no such prohibition, nor have I found any other restriction or prohibition which would apply elsewhere in the Constitution. Article VIII of the New Mexico Constitution contains examples of express limitations on the state's inherent power to tax, with provisions requiring uniformity of taxation, providing for exemption of certain property from property taxes, imposing certain limits on property taxes, etc. Obviously, the right to acquire, possess and protect property secured in Article II, § 4 is not so encompassing as the Shahan's argue, for otherwise, all taxes on property would be prohibited. Instead, the Constitution's framers understood that the power to tax property was inherent in the state and they provided for certain limitations on that power under Article VIII.

Additionally, the Shahan's argument is erroneous in its characterization of the tax at issue. They argue that it is a tax upon the exercise of the privilege of owning and establishing a home. While under the facts of this case, the tax applied to the cost of the purchase of the Shahan's home because the thing purchased was a mobile home, the compensating tax is broadly imposed upon the privilege of using any kind of tangible personal property in New Mexico. The fact that in this case, the property being used is a home does not change the legislative determination that the tax is imposed upon the use of property, and the legislative determination governs this issue.

The Shahan's argue that the compensating tax should be applied only to those engaging in business, that such taxes should be enforced against businesses and the Department should prohibit the passing on of the cost of such taxes to individual consumers. I can find no language in the statutes imposing compensating tax which limits the imposition of the tax to businesses. The tax is imposed upon persons. See, §7-9-7. "Person" is defined quite broadly in the Gross Receipts and Compensating Tax Act. Specifically, "person" is defined at § 7-9-3(H) to mean:

(1) any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, limited liability partnership, joint venture, syndicate or other entity, including any gas, water or electric utility owned or operated by a county, municipality or other political subdivision of the state, or

(2) any national, federal, state, Indian or other governmental unit or subdivision, or any agency, department or instrumentality of any of the foregoing;

Thus, it is clear that the tax is imposed far more broadly than just upon businesses. Additionally, there is no prohibition on businesses passing on the cost of such taxes to their customers. In fact, § 7-9-9 contains a legislative recognition that in many instances the cost of the compensating tax may be paid by the purchaser because it provides that:

Any person in New Mexico using property on the value of which compensating tax is payable but has not been paid is liable to the state for payment of the compensating tax, but this liability is discharged *if the buyer has paid the compensating tax to the seller for payment over to the department.* (emphasis added).

Finally, the Shahan's cite to a number of cases from other states in support of their claim for refund. First, they cite to *Jack Cole Company v. MacFarland*, 337 S.W.2d 453 (Tenn, 1960) for the proposition that the legislature may not name something to be a taxable privilege unless it is

first a privilege. In this case, the Tennessee Supreme Court struck down a tax imposed upon income. A review of this case reveals that the Tennessee Supreme Court based this conclusion on some rather unique language found in the Tennessee Constitution which had granted the legislature the power to tax the income from stocks and bonds. The Tennessee Supreme Court in *Evans v. McCabe*, 52 S.W.2d 159 (1932) had construed this language narrowly as only granting the legislature the right to tax income from stocks and bonds, thus implicitly restricting the legislature's right to tax income from any other source other than stocks and bonds. The language the Tennessee Supreme Court relied upon is not found in either the United States Constitution or the Constitution of the State of New Mexico. Thus, the ruling in that case has no applicability here.

The Shahans cite to *Redfield v. Fisher*, 292 P. 813 (Or. 1930) for the proposition that natural, inherent rights cannot be taxed. This language was dicta² in the court's opinion which is not even binding law in Oregon, let alone other taxing jurisdictions.

Nor do the other decisions cited to apply to the facts of this case. *Stevens & Woods v. State*, 2 Ark 291 (1840), held that under the Arkansas Constitution, keeping billiard tables was not a privilege subject to taxation. As noted above, New Mexico's Constitution does not limit the state's inherent power to tax to only enumerated privileges. *Spring valley Water Works v. Barber*, 33 P. 735 (Cal, 1893) had struck down a special franchise tax on property. That decision turned on the definition of franchise, which has no applicability in the case at bar.

² Dicta is shorthand for the Latin phrase *obiter dictum*, which refers to statements, remarks or observations of a court which are not essential to the determination of the issue in the case and are thus not binding upon lower courts.

In conclusion, there is simply nothing in the laws or constitution of New Mexico which prohibits the imposition of compensating tax upon the Shahans under the circumstances of this case.

CONCLUSIONS OF LAW

1. The Shahans filed a timely, written protest to the denial of their claim for refund and jurisdiction lies over both the parties and the subject matter of this litigation.

2. The imposition of compensating tax in the circumstances of this case is not prohibited by Article II, §4 of the New Mexico Constitution.

3. Compensating tax was properly imposed upon the Shahans under the circumstances of this case for the privilege of using property in New Mexico.

For the foregoing reasons, the Shahan's protest IS HEREBY DENIED.

DONE, this 16th day of September, 1997.